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No. 126.

Br. of Davis, Dudley & McChesney for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 126.

D. MARX, *Appellant*,

vs.

WILLIAM M. EBNER AND THE EBNER GOLD MINING COMPANY.

BRIEF FOR THE APPELLEES.

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Supreme Court of the United States.

D. MARX, *Appellant*,
vs.
THE EBNER GOLD MINING COMPANY AND WILLIAM M. EBNER, *Appellees*.
No. 126.

BRIEF FOR APPELLEES.

I.

Statement of the Case.

We have not been favored with a statement in the brief for the appellant, and therefore we feel obliged to make a statement of the case as it appears of record.

The Takou Mining and Milling Company, a corporation organized under the laws of Oregon, on the 2d of August, 1889, was the owner and in possession of certain property in Alaska, and on that day it executed a note to Samuel Coulter for $98,405.91, payable ninety days from that date, and to secure the payment of the note the company executed to Samuel Coulter a mortgage upon that property. Rec., 1 and 2.

April 1, 1893, the company sold a portion of the mortgaged property to Sylvester Farrell. Rec., 2.

November 1, 1893, Samuel Coulter assigned the note and mortgage to Willis Thorp by formal deed of assignment acknowledged before a notary public. Rec., 2, 8 and 9, Exhibit "B." This instrument was filed for record in the Juneau recording district, Alaska, November 20, 1893. Rec., 9.

December 21, 1893, Willis Thorp filed in the United States District Court for the District of Alaska a suit to foreclose the mortgage, making the Takou Mining and Milling Company and Sylvester Farrell, who had purchased a portion of the property, defendants therein; and on the same day summons was issued and delivered to the marshal who made return thereon January 2, 1894, "that, after due and diligent search, neither of the within-named defendants, nor their agents, could be found within this district." Rec., 2, 3, 12, 13.

January 5, 1894, there was filed by the plaintiff an affidavit subscribed and sworn to by John G. Heid, who describes himself therein as the attorney for the plaintiff. The affidavit recites the substance of the complaint, declares its material allegations to be true within the personal knowledge of the affiant, states that the Takou Mining and Milling Company is a foreign corporation organized under the laws of the State of Oregon, and is the owner of the property described in the complaint; that the defendant, Sylvester Farrell, is not a resident of the District of Alaska but resides in the city of Portland, Oregon, and is the owner of that portion of the property

which was conveyed to him by the company April 1, 1893, subsequent to the execution of the mortgage; that no officer of the corporation resided within the District of Alaska, and that it had no managing agent or representative within the district; "that the president of the defendant corporation is Samuel Coulter, whose post-office address is No. 246 Washington street, Portland, Oregon; that the post-office address of said defendant, Sylvester Farrell, is Portland, Oregon, where said defendant Farrell resides; that affiant is ignorant of the residence number of said defendant Farrell, if any he has." The affidavit then states that summons was duly issued to the marshal and that the marshal had returned it to the clerk of the court with his return endorsed thereon to the effect that neither of the defendants could be found within the district. The affiant also deposes that the plaintiff has a good cause of action against the defendants and that the company and said Farrell are necessary and proper parties thereto, and that personal service of summons cannot be made on the defendants. Thereupon the plaintiff demanded that service of the same be made by publication. Rec., 14, 15.

January 5, 1894, Warren Truitt, Judge of the United States District Court for the District of Alaska, made a written order reciting the filing and consideration of the affidavit of John G. Heid, attorney for the plaintiff; and reciting its material averments, ordered that the service of the summons be made upon the defendants by publication in the Juneau City Mining Record, a newspaper published

at Juneau, Alaska, once a week for eight weeks, and further ordering that copies of the summons and of the complaint should be deposited forthwith in the post-office, post-paid, directed to each of said defendants at his place of residence in the State of Oregon. Rec., 15, 16. The marshal made his certificate or return, in which he showed that he had obeyed the order of the court and had duly mailed copies of the complaint and summons as directed. Rec., 16. The order and certificate were duly filed in the court. Rec., 15, 16. The plaintiff, April 4, 1894, filed an affidavit of publication made by the printer and publisher of the Juneau City Mining Record, in which he stated that the summons, a copy of which was annexed to his affidavit, was published in the newspaper once a week for nine consecutive weeks. Rec., 17. The summons will be found at Record, page 17, 18. Default was obtained May 4, 1894, at Sitka. Rec., 19.

June 7, 1895, Warren Truitt, Judge of the District Court of the United States for the District of Alaska, signed a judgment and decree of foreclosure and sale in the suit, and on the same day it was filed with the clerk, entered and spread upon the records. See Rec., 18 to 23. This decree includes among the defendants John W. Irvin, who had come into the case as plaintiff in intervention, as we gather from the decree itself. The decree also recites that Willis Thorp, the plaintiff, had duly obtained and entered an order of default against the defendants, the Takou Mining and Milling Company and Sylvester Farrell, May 4, 1894. The

decree also recites that the two defendants named were duly, regularly and legally served with summons and complaint in the action. Then follow the usual finding, order, judgment and decree.

July 12, 1895, the marshal, acting under the judgment and decree aforesaid, sold the mortgaged property to Willis Thorp for $75,000. Rec., 23, paragraphs XII, XIII.

September 12, 1895, Warren Truitt, Judge of the United States District Court for the District of Alaska, entered an order confirming the sale so made by the marshal to said Thorp for $75,000. This order recites the acts of the marshal in the premises and approves and confirms the sale so made, and directs the marshal to execute a deed to the purchaser, Willis Thorp. Rec., 24 to 26. Immediately thereafter Thorp entered into possession of the property and then conveyed it to William M. Ebner and the Ebner Gold Mining Company, to whom Thorp surrendered the possession, and ever since that time they have been and now are in possession thereof, and have been and are receiving the income and profits therefrom.

September 4, 1898, Sylvester Farrell and his wife and the said Takou Mining and Milling Company sold and conveyed all the property to the appellant, D. Marx.

November 12, 1898, D. Marx, in the District Court of the United States for the District of Alaska, brought suit against William M. Ebner and the Ebner Gold Mining Company and claimed that, by reason of the conveyance to him so made by Sylves-

ter Farrell and the Takou Mining and Milling Company September 4, 1898, he had become the owner and was entitled to the possession thereof. He averred that no suit was ever commenced in any court, nor had there been any proceedings to foreclose the mortgage other than the proceedings above described, and that the defendants had no interest in the property nor any claim thereto, except as described in his complaint. He also averred that no jurisdiction was ever obtained by that court, or any other, in any suit or proceeding, to foreclose the mortgage or to bar or devise the interest of Sylvester Farrell or the plaintiff Marx, or the Takou Mining and Milling Company in said property. Rec., 26.

It is averred in the complaint that Willis Thorp and the defendants, William M. Ebner and the Ebner Gold Mining Company, while in possession of the property, have received in the profits and income therefrom a sum equal to the amount of said mortgage and the interest thereon, except the sum of $1,000, which sum only is now due thereon, and which the plaintiff offers to pay. Rec., 26.

The complaint avers that there was no District Court of the United States for the District of Alaska at the time said proceedings were had, and that neither the complaint nor the affidavit for the order of publication of summons or subpœna, nor the summons or subpœna published, nor the order of publication or proof thereof, nor the proof of deposit in the post-office, are in accordance with the statutory requirements of the laws of Oregon or of the District of Alaska, or of the United States, in

force at the time of the proceedings, and that no valid summons or subpœna was ever issued or served personally or otherwise upon Sylvester Farrell, or upon said Takou Mining and Milling Company, nor was any valid judgment or decree ever rendered against them in the matter or proceedings in the complaint described.

The plaintiff prayed relief as follows: First, that the defendants be declared to be mortgagees in possession of the property; second, that the defendants have been fully paid the amount of the mortgage and interest, except $1,000, which they and Thorp received from the profits and income while the property was in their possession, or, if not so paid, that an accounting be had to ascertain the amount; third, that the defendants vacate the property, surrender possession thereof to the plaintiff, and that the pretended decree of foreclosure be annulled; fourth, that the plaintiff recover his costs and disbursements from the defendant. Rec., 27.

November 23, 1898, the defendant below demurred to the bill. Rec., 30, 31. January 6, 1899, the court sustained the demurrer to the bill. The plaintiff refused to plead further and elected to stand by his bill, and thereupon the court ordered and adjudged that the bill of complaint be dismissed. Rec., 32. The plaintiff Marx has appealed from that judgment to this court. For the assignment of errors, see Rec., 33, 34.

II.

Argument.

1. It is plain, we think, that the appellant here is relying upon the theory that the court below acted without sufficient power or authority in decreeing the foreclosure of the mortgage. The appellant seems to be of opinion that there was no such court as the one which undertook to foreclose the mortgage and that, if there was such court, neither complaint nor the affidavit for the order of publication, or any of the pleadings or proceedings, were sufficient in law to justify the court in entering the decree of foreclosure.

Was there a court of competent jurisdiction to hear, try and determine the foreclosure suit brought by Willis Thorp?

The civil and judicial District of Alaska was established by the act of May 17, 1884, (23 Stats. 24). The first section of that act created the District of Alaska and declared that it should "constitute a civil and judicial district." The third section of the act is as follows:

> "That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed

for said district, who shall during his term of office reside therein and hold at least two terms of said court therein in each year, one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November. He is also authorized and directed to hold such special sessions as may be necessary for the dispatch of the business of said court, at such times and places in said district as he may deem expedient, and may adjourn such special session to any other time previous to a regular session. He shall have authority to employ interpreters, and to make allowances for the necessary expenses of his court."

The seventh section of the act contains the following language:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States; and the sentence of imprisonment in any criminal case shall be carried out by confinement in the jail or penitentiary hereinafter provided for. But the said district court shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights, or the constitutionality of a law, and in all criminal offenses which are capital.

These statutes were considered and quoted in McAllister *vs.* United States, 141 U. S., 174, 179, and the court said:

"In view of these and other provisions of that act, it is clear that the District Court for

> Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States."

The appellant avers that there was no District Court of the United States for the District of Alaska at the time the proceedings complained of were had. We submit that it does not matter what name a complainant in Alaska may give the court in which he files his bill if that court has jurisdiction of the suit. Courts are neither made nor unmade by the names applied to or given them by parties. It is worthy of note, however, that in this court that District Court of Alaska has been described as "the District Court of the United States for the District of Alaska." Bennett *vs.* Harkrader, 158 U. S., 441, in which mining property was involved, and Malony *vs.* Adsit, 175 U. S., 281, which was an action in ejectment involving the title to a town lot.

In that Alaskan court, no matter what its name, there was vested a jurisdiction so wide as to cover the civil and criminal jurisdiction of District Courts of Alaska and of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with the act, as may be established by law, and it was also enacted that that court should have "exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights,

or the constitutionality of a law, and in all criminal offenses which are capital." Section 7, Act of May 17, 1884.

2. If the laws of Oregon furnished the rules of practice by which the court below was to be guided in the foreclosure of the mortgage, we submit that they were complied with by the court. The laws of Oregon provide a manner of commencing suits in equity. In section 389, page 405, Chapter 5 of Hill's Annotated Laws of Oregon, under the head of "Suits in Equity," it is enacted:

> "The provisions of Chapter 1 from and inclusive of Title 5 of such Chapter, to and inclusive of Title 8 thereof, shall apply and govern the mode of proceedings in suits, except as otherwise or specially provided in this Chapter."

The sections of the Oregon Code hereinafter cited or copied are included in Chapter 1, Title 5.

Sections 52, 53, 54 and 55 relate to the substance of the summons and the service thereof within the State.

Section 56 is as follows:

> "When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or justice of the peace, in an action in a justice's court; and it also appears that a cause of action exists against the defendant, or that he is a proper party to

an action relating to real property in this State, the court or judge thereof, or a justice of the peace in an action in a justice's court, shall grant an order that the service be made by publication of a summons in either of the following cases:

"1. When the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein;

"2. When the defendant, being a resident of this State, has departed therefrom with intent to defraud his creditors, or to avoid the service of the summons, or with like intent keeps himself concealed therein, or has departed from the State and remained absent therefrom six consecutive weeks;

"3. When the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action.

"The summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint."

Section 56*a* is as follows:

"All legal notices, summonses, citations, and legal advertisements, of any description now required, or which may hereafter be required, by law to be published, may be published in any weekly newspaper of general circulation published in the county where the action, suit, or other proceeding is pending, or is to be commenced or had, in which such notice, summons, citation, or other advertisement is required to

be given: and if there be no such paper published in such county, then in the weekly newspaper of general circulation published nearest to the county seat of the county in which such action, suit, or other proceedings is pending, or is to be commenced or had."

Section 57 is as follows:

"The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and if there be no newspaper published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer by the first day of the term following the expiration of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. In case of personal service out of the city, the summons shall specify the time prescribed in the order for publication."

Section 58 is as follows:

"The defendant against whom publication is

ordered, or his personal representative, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected."

Section 59 is as follows:

"Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve a summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on, until service be had; or the plaintiff may proceed by publication as in this title provided, at his election."

Section 61 is as follows:

"Proof of the service of the summons, or of the deposit thereof, in the post-office, shall be as follows:

"1. If the service or deposit in the post-office be by sheriff or his deputy, or by a constable or marshal, the certificate of such officer; or,

"2. If by any other person, his affidavit thereof; or,

"3. In case of publication, the affidavit of the printer, or his foreman, or his principal clerk, showing the same; or,

4. "The written admission of the defendant.

"In case of service otherwise than by publication, the certificate, affidavit, or admission must state the time and place of service; and in case of deposit in the post office, the time and place thereof."

Section 62 is as follows:

"From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."

The procedure provided by section 56 of the Oregon Code heretofore quoted is constitutional. Pennoyer *vs.* Neff, 95 U. S., 714; Hart *vs.* Sansome, 110 U. S., 151; Cooper *vs.* Reynolds, 10 Wall., 319; Eitel *vs.* Foote, 39 Cal., 441.

The affidavit of John G. Heid (Record, 14) shows that the Takou Mining and Milling Company is a foreign corporation, organized and existing under the laws of the State of Oregon, and has no managing agent or representative within the District of Alaska. Upon this statement of fact, it is conclusively presumed that the corporation is a citizen of the State of Oregon and incapable of citizenship or legal residence in the District of Alaska. 1 Foster's Federal Practice, section 19.

True, it might have had a managing agent or representative within the district, but that is specifically denied by the affidavit. It is also averred

in the affidavit that Sylvester Farrell is not a resident of the District of Alaska, but is a resident of the city of Portland, Oregon. The affidavit then proceeds with the statement that a summons was duly issued out of the court to the United States marshal for the District of Alaska, with directions to him to serve it upon the defendants, but the marshal has returned it to the clerk with his return thereon endorsed, that neither of the defendants could be found in the district. This return is copied on page 13 of the Record. Moreover, the affidavit of Mr. Heid states, in the concluding sentence, that service of the summons cannot be made on the defendants. The return of the marshal and the affidavit of Mr. Heid show the exercise of due diligence, as it seems to us, in the effort to find the defendants within the district.

If the marshal could have found the defendants or either of them within the district by retaining the summons in his possession for a longer time, but instead of retaining it made the return copied on page 13 of the Record, he might have rendered himself liable upon his bond, but such fact cannot justify a court of equity in setting aside the judgment rendered subsequent to the return.

We will add that the marshal was under no legal obligation to hold the summons in his possession for any particular period of time, but he discharged his duty when he satisfied himself that he could not serve either of the defendants. It may well be that between the date he received the summons, December 22, 1893, and the date of its return, January

2, 1894, he made due and diligent search for the defendants and their agents. He was only required by the law to search where he might have reasonable grounds for thinking they might be found within his district. As the property with which they had been connected was in the neighborhood of Juneau, Alaska, the official residence of the marshal, he was justifiable in making search for the defendants there and in certifying in his return that he had made due and diligent search for them, but could not find them within his district. This return is supported adequately by the affidavit of Mr. Heid, and the two taken together justified the order of publication made by the court.

In granting the order that the service be made by publication of summons, the court or judge acts judicially and can know nothing about the facts upon which the order is granted, except from the affidavit filed. Ricketson *vs.* Richardson, 26 Cal., 154. Where the affidavit for service by publication follows the language of the statute and the proceedings in other respects are regular, jurisdiction of the defendant is properly obtained. State *vs.* Adams, 56 Wis., 137.

In the case at bar, the affidavit filed and the order made by the judge were in compliance with the laws of Oregon, the proof showing that the defendants could not be found within the State after due diligence, which proof was to the *satisfaction of the judge* as required by section 56; and therefore the service by publication and mailing was sufficient to authorize the court to take jurisdiction.

It is true that ordinary diligence to obtain personal service must be shown to entitle a party to service by publication. Trullenger *vs.* Todd, 5 Oregon, 56. The record shows that the marshal received the summons for service December 22, 1893, and that after due and diligent search neither of the defendants, nor their agents, could be found within the district and the marshal made his return on the summons to that effect January 2, 1894. Rec., 13. On the following day the plaintiff filed the affidavit of John G. Heid. Rec., 14. This affidavit was made upon the personal knowledge of Mr. Heid, although it would have been sufficient had it been made on information and belief. Steinle *vs.* Beall, 12 Abb. Pr. (N. S.), 171. On the strength of this affidavit the court made the order of publication, January 5, 1894. Rec., 15, 16. *It is evident that the court was satisfied.* On the same day, as is shown by the marshal's return, Record, 16, he mailed a copy of the complaint and summons to each of the defendants, as required by the order of the court, and also by section 57 of the Oregon Code. The summons may be found. Record, 17. This is the one which was published in the "Juneau City Mining Record" in compliance with the Oregon Code, section 56*a*. It will be observed that the summons contains the name of the court, the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint; all in strict compliance with the concluding sentence of section 56 of the Oregon Code.

It is true that the order of publication (Record, 15, 16) is dated "January —, 1894," but it is also shown by the endorsement thereon that it was filed with the clerk of the court January 5, 1894. Record, 16. The date of filing will supply the blank in the date of the order. It is true also that there is a statement on page 15 of the Record that Thorp filed with the clerk this order of publication and the marshal's return "on April 4, 1894." The clerk's endorsement on the back of the order, showing that it was filed with him January 5, 1894, the certificate of the marshal (Record, 16) "that in obedience of an order from the District Court of the United States for the District of Alaska, bearing date January 5, 1894," etc., and the statement in the summons that the order was "made January 5, 1894," must be taken as conclusive against the other statement or averment that the two papers were filed with the clerk April 4, 1894.

The proof of publication in the "Juneau City Mining Record" was filed April 4, 1894, and is in the form of an affidavit by E. Otis Smith, who deposes that he is the printer and publisher of the weekly newspaper printed and published in the town of Juneau, said District of Alaska, known as the "Juneau City Mining Record," in compliance with clause 3 of section 61 of the Oregon Code, requiring the affidavit of the printer, or his foreman, or his principal clerk.

The order of publication requires "that such publication be made at least once a week for eight weeks." Record, 16. The summons which was

thus required to be published required the defendants, within twenty days from the date of the service of the summons upon them, to wit, "within twenty days from the fifth day of March, A. D. 1894," to answer the complaint. Bottom of page 17, Record. The affidavit of publication (Record 17) avers that the summons "was published in said newspaper once a week for nine consecutive weeks, commencing on the 13th day of January, 1894, and ending on the 17th day of March, 1894." The order of publication required no more than a publication once a week for eight weeks. These eight publications were made January 13, 20, 27; February 3, 10, 17, 24, and March 3, 1894. The summons published required the defendants to answer "within twenty days from the fifth day of March, 1894." Thus the defendants were given their full twenty days from the 5th day of March, 1894, and they were given the eight publications as required by the order of the court. As a matter of fact, and as this Record fully discloses, the default was not entered until May 4, 1894. Record, 19. So the defendants had not only twenty days from March 5, 1894, in which to answer, but they actually had sixty days from that date. At any rate, the court having jurisdiction of the case so interpreted the order, the summons, and the publication as to justify it in entering a default May 4, 1894, and in rendering a judgment June 7, 1895, thirteen months after the default was entered.

Even had that interpretation and judgment been erroneous, the appellant and his grantors, having

stood by for several years thereafter, and having allowed great improvements to be put upon the property by reason of the appellee's faith in the judgment of the court, are now estopped from questioning that judgment on the ground that they did not have adequate or lawful notice, and they are estopped from denying appellee's title to the property under the judgment and execution sale. Kirk *vs.* Hamilton, 102 U. S., 68, and cases there cited.

In the case of Odell *vs.* Campbell, 9 Oregon 298, it was held that the proof of publication can be made only by a person holding the position of printer, or foreman, or his principal clerk. The proof of publication in the case at bar falls within the strict requirements of the code and of the decision just cited.

The only criticism that can be made by the appellant upon all these proceedings, as it seems to us, is that, from his point of view, there is no such court as the "United States District Court for the District of Alaska" named in the proceedings, record, affidavit, returns, publication, proof and decree. If the complainant in that case made a mistake in the name of the court, it is clear that he did not make a mistake in finding a court, no matter what its name, that had jurisdiction of the cause under the terms of the law which created it. Such a mistake, if it can be called a mistake, is one which could be remedied by amendment, and the law will now treat the record of that case as if it had been amended.

We submit that it is now too late to raise the question, and that, if it were not too late, the mistake, if it be one, is so trivial as to be unworthy of the serious consideration of any court.

If it be true that the term of court at Sitka, Alaska, commenced on the first Monday of May, the summons was clearly within sections 55 and 56 of the Oregon Code, requiring the defendant to appear and answer by the first day of the term following the expiration of eight weeks "prescribed in the order of publication." If the time named in the summons matured during vacation, the court not being in session at Sitka, it is unquestionable that the summons was good for the next regular term thereof, to be held after the expiration of the time named in the summons. If the court could not have been in session twenty days from March 5, 1894, that was a thing of which the defendants had to take notice. They were also required to know whether or not the court was in session at that time. They were also required to know that the next session of the court at Sitka would be in May. Moreover, the Oregon law provides that a defendant shall have until the first day of the term next following the publication of the summons within which to appear and answer. This provision of the law the court will read into the summons, and the effect of the summons is exactly the effect of the statute.

3. *Was there a rule of court prescribing the mode of procedure in equitable cases?*

We are advised by local counsel and therefore

state that at the time of filing the bill to foreclose the mortage, December 21, 1893, the District Court of Alaska had not adopted any rule prescribing the mode of procedure in equity cases, and that no other rules than those furnished by the laws of Oregon were made until 1896, when the court prescribed such rules and ordered that process in equity and admiralty should be in accordance with the practice of the Federal courts.

We are advised by local counsel and therefore state that this language is in subdivision 3, rule 4, of the District Court of Alaska, prescribed in 1896. We are also advised by local counsel and therefore state that after the adoption of this rule, and in the case of the Executor of Charles Wells against R. F. Lewis, in an unpublished opinion, Judge Delaney of the District Court of Alaska, in overruling a motion to quash a summons in an action to foreclose a mortgage on the ground that a subpœna was the only process in an equity proceeding, held that either a summons, as provided in the Oregon Code, or a subpœna as provided for under the practice in the Federal courts would confer jurisdiction, and that the complainant in the case before him might have proceeded under either practice, Oregon or Federal, for there was no statute or rule in existence at the time, either mandatory or directory, to control his action. We submit that this view of Judge Delaney is sound. The District Court of Alaska in many respects wields the powers of a State court as well as those of a Federal court. If either a State court or a Federal court similarly

situated would have had jurisdiction of the proceeding to foreclose the mortgage, then it follows that the jurisdiction in the District Court of Alaska was a concurrent one, and, under the act of March 3, 1875, giving circuit courts of the United States and State courts concurrent jurisdiction of certain causes, this action might have been brought in either, and therefore it was properly brought in the District Court of Alaska.

In the foreclosure case of Thorp *vs.* Takou Mining and Milling Company, the jurisdiction of the Federal court was not invoked by any allegation which would confer jurisdiction on a Federal court to the exclusion of the jurisdiction of a State court, for citizenship in another State than Oregon was not pleaded. On the contrary, the corporation is alleged to be a resident of Oregon. The plaintiff's residence is not given, and the inference is that he also was a resident of Oregon. As the property mortgaged was in Alaska, the suit, of course, had to be instituted in the Alaskan court. A Federal court can only acquire general equity jurisdiction in cases of diverse citizenship where it is alleged that the litigants are citizens of different States, and in order to confer this jurisdiction the bill must show affirmatively every fact necessary to give jurisdiction, the presumption being that such court has no jurisdiction. Bones *vs.* Preston, 111 U. S. 225.

Even if the jurisdiction of the Federal side of the District Court of Alaska had been invoked on the ground of citizenship, and none other, it would have been denied because it is held by this court that the

constitution and laws of the United States give jurisdiction to the circuit courts to hear and determine the rights of citizens of different States and of aliens only, that citizens of the territories and of the District of Columbia are incapable of bringing suits in such courts, and that they cannot compel citizens of such territories or of the District to appear and answer any legal or equitable procedure, nor even allow them to make voluntary appearance as defendants. 1 Foster's Fed. Prac., sec. 18, 19, and cases cited.

The circuit and district courts of the United States are limited in jurisdiction, but the District Court of Alaska has jurisdiction of every possible class of cases that can be brought in that territory regardless of the question of citizenship.

4. *Should the complainant have complied with section 738, Revised Statutes of the United States!*

That section is as follows:

> "When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day, therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner

as the court shall direct. If such absent defendant does not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court in its discretion, it shall be lawful for the court; upon proof of the service or publication of the said order, and of the performance of the directions contained therein, to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district. But the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only."

If the question be answered in the affirmative, then we respectfully submit that the proceedings in the court below in the suit to foreclose the mortgage were in compliance with the provisions of that section. The proceedings which were adopted by the complainant and by the court below not only met every requirement of section 738, but also met every requirement of the Oregon Code, as we have heretofore shown. We submit therefore that the procedure adopted in this case complied with the Code of Oregon as well as with the statute of the United States and the rules of practice governing the Federal Courts.

5. *Does it appear that the appellant Marx and those from whom he claims right and title have shown diligence?*

June 7, 1895, more than twelve months after the service and publication of summons, a final decree

was taken. Rec., 18. Then came the sale of the property and the order confirming the sale, which bears date of September 12, 1895. Rec., 24. The appellant Marx does not allege that neither he nor his assignors were ignorant of the proceedings in the case, either in whole or in part; nowhere does he deny knowledge on the part of himself or his assignors of the filing of the bill to foreclose the mortgage, and of every other step taken in connection with the suit. In the absence of such averments, the inference, as it seems to us, is plain and unmistakable that he and his assignors knew everything. It is a matter of legitimate inference therefore that they had determined to wait for the purchaser of the property to expend large sums of money in developing mines. It is inconceivable that they were ignorant of the fact that this valuable property had been taken into possession by others and was being improved and worked by them with profit. At any rate, they did not take the steps or protection that are permitted by section 58 of the Oregon Code heretofore quoted, and which gave them the right to defend the action within one year after the entry of such judgment and on such terms as might be just. The judgment was filed June 7, 1895, and under the section cited the assignors of appellant had until June 7, 1896, to come into court and be heard in defense of the action. We ask attention to the further fact that two years and five months elapsed between the filing of the suit and the rendition of judgment. Instead of taking advantage of the Oregon Code, or

of bringing such a suit in equity as they eventually brought in the court below, the appellant Marx and his assignors waited until November 12, 1898, before commencing proceedings. We submit that a want of diligence is shown here, and that the complainant does not come into court with clean hands. The inferences and presumptions and equities are all against him, and he is covered by the doctrine of Kirk *vs.* Hamilton, 102 U. S., 68, and cases cited.

6. *Can it be said of the appellant that he has done equity or has offered to do equity in the premises?*

Willis Thorp, who is the assignor of the appellees, paid $75,000 for the property at marshal's sale. Rec., 25. Thorp and his assigns have been in possession of the property ever since its sale, and that its use was of value is the inference to be drawn from the averment that the profits and income have been sufficient to pay off the mortgage of $98,405.91. Rec., 26 and 3. So it is clear that this is valuable property, and the purpose of the appellant Marx and his assignors in waiting until the six years' statute of limitations has almost run is equally clear. Shall that purpose be affected by the court on such averments as are to be found in this bill? There is in the bill no averment of restitution, or an offer to restore, or of a tender of the amount due. It is averred that Thorp paid $75,000 for the property and that its profits and income have been so great to the appellee that they will amount to enough to pay off the mortgage debt of $98,405.91, with interest at the rate of 8 per cent per annum from August 20, 1889, except $1,000. The appellant seems to

have been unmindful of the maxim that "he who would have equity must do equity." He can not escape this rule by such averments as are found in this bill, we think.

The last sentence of section 58, Oregon Code, is this: "*But title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected.*" There is the essence of equity!

7. *What would be the effect upon titles in Alaska if the judgment of the court below were to be reversed?*

We are advised by local counsel and therefore we assert the fact to be that since the creation of the District Court in Alaska the practice has been uniform in cases of this character and situation, and that to reverse the judgment of the court below and set aside the decree in foreclosure will be to overthrow the titles to valuable real estate in all portions of the territory, and that no other method of procedure than the one followed in the case at bar had been adoped by that court in any case where the defendant lived outside the territory. The purchasers in good faith have gone on for years improving and developing their properties, placing entire reliance in the judgments of the court, and confident in the belief that their titles were valid and beyond question. The reversal of the judgment of the court below would disturb the repose of all these titles, and not only do the appellees great injury but would work irreparable injury to

a large number of people in the territory who have acquired titles in the same way.

This manner of procedure had become the rule of practice and procedure; and in the language of Chief Justice Murray, in Siblin *vs.* Jordon, 6 Cal., 418, "A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if deviated from."

In Welch *vs.* Sullivan, 8 Cal., 188, the court said:

> "Courts are permitted to exercise a wide discretion, and judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion simply because some abstract principle of law had been incorrectly established in the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves or their predecessors, and at the same time refused to overthrow the rule established. That judge who, from petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and unworthy of the high trust that had been confided in him."

In Grignon *vs.* Astor, 2 How. (U. S.), 343, the court, by Baldwin, J., said:

> "We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that or

> the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of those courts to whom the laws of the States confide full jurisdiction over the subject."

"The rule of *stare decisis*, so far as it applies to the decisions of our own court, should not be disregarded but on the fullest conviction that the law has been settled wrong; and even then we should pause and consider how far the reversal would affect transactions entered into and acted upon under the law of the court." Sydnor *vs.* Gascoigne, 11 Tex., 455.

In Harrow *vs.* Meyers, 29 Ind. 470, the court, speaking of real estate titles, said:

> "The repose of titles is important to the public. Upon the faith of these decisions our people have for a considerable period of years invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed."

In Rockhill *vs.* Nelson, 24 Ind, 424, the court said, by Gregory, J.:

> "We cannot change a decision without pro-

> ducing confusion in titles, as the ruling would necessarily relate back to the time the law came in force."

We deem it not irrelevant to cite the Act of Congress of April 7, 1874, in this connection. Manifestly the Congress had in mind conditions somewhat similar to those surrounding this case: and in order to prevent confusion, uncertainty and distrust, where titles had been acquired under circumstances corresponding to those under which appellees acquired theirs, it was enacted,

> "That it shall not be necessary in any of the courts of the several territories of the United States to exercise separately the common law and chancery jurisdictions, vested in said courts, and that the several codes and rules of practice adopted in said territories respectively, in so far as they authorize the mingling of said jurisdictions, or a uniform course of proceedings in all cases, whether legal or equitable, be confirmed, and that all proceedings heretofore had or taken in said courts, in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be and the same are hereby validated and confirmed."

In conclusion, we respectfully submit, that in sustaining the demurrer to appellant's complaint, the court committed no error, and its actions should be affirmed.

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No. 126.

Reply Brf. of Davis, McElroy & McKenney for Appellees.

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No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBN[illegible] ET AL., APPELLEES.

Appellees' Memoranda in Response to Supplemental Brief for Appellant.

1. The statute cited is Oregon Code, section 852 [842]. This is the first section of Title I, Chapter X, page 52, Volume 1, Hill's Oregon Code. The chapter is headed, "Of Evidence in Particular Cases," etc. The title is headed, "Of Evidence in Particular Cases." The section, title, and chapter relate to evidence only—not to pleading.

2. The following Oregon cases hold that a tender must be made and pleaded: *Atkinson vs. Morrisey*, 3 Or., 332, 336, 337; *Smith vs. Foster*, 5 Or., 44; *Bartel vs. Lope*, 6 Or., 321–327; *Sellwood vs. Gray*,

11 Or., 534; *Brown vs. District*, 12 Or., 345; *Holladay vs. Holladay*, 13 Or., 523, 536, 537.

Some of these cases consider and apply the section of the Oregon Code above cited.

3. The case of *Casserly vs. Witherbee*, 119 N. Y., 528, is contrary to the overwhelming weight of authority. See 2 Jones on Mortgages, 5th ed., sec. 1088, and cases cited; also *Collins vs. Riggs*, 14 Wall., 491, 493.

4. *Brown vs. Bank*, 148 Mass., 307–8, holds that "where one occupies the position of assignee of the mortgagee, the prayer that he may be allowed to pay such sum as may be found is sufficient under the Pub. Sts. C. 181, section 17, and is to be considered as such." The statute cited expressly enacts that a person entitled to redeem may "bring a suit for redemption without a previous tender, and may in such suit offer to pay such sum as shall be found due from him."

The case is based on a positive statute and is not in point here.

5. In *Sweyle vs. Bell*, 20 Or., 323, a suit to redeem, there was a balance due of $4,034.46, and the court found that "about and prior to the commencement of this suit, the plaintiff offered to pay the estate of said Charles Sweyle the sum of $4,034.46, and served upon the defendants an offer in writing to pay the same, and that the offer was not accepted by the defendants." The court ordered the plaintiff to pay into court, for the use of the estate of Sweyle, the sum named within sixty days, and that

the defendants execute a conveyance, (See page 324.) The case went to the Supreme Court and that court, on page 328, *expressly refused to pass upon the question of the sufficiency of the tender.* Therefore the case should not have been cited by the appellant here in support of his contention.

6. "This right to an account may be extinguished by a release or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account."

Russell vs. Southard, 12 How. (U. S.), 139–155.

It is submitted that the mortgagor and its assignee have been guilty of such negligence in the case at bar that they are not entitled to the relief sought.

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